No. 13110

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL NELSON, individually; and as an heir, devisee and legatee of Olof Zetterlund, deceased, suing on his own behalf and on behalf of all other heirs, devisees and legatees of Olof Zetterlund, deceased, similarly situated; etc.,

Plaintiff and Cross-Defendant,

vs.

DORA MILLER and HAROLD M. DAVIDSON, both individually, and as pretending co-executors, or co-executors *de son tort,* of the estate of Olof Zetterlund, deceased,

Defendants and Cross-Complainants.

DORA MILLER and HAROLD M. DAVIDSON, co-executors of the Estate of Olof Zetterlund, deceased,

Cross-Complainants and Complainants in Interpleader,

vs.

STATE OF CALIFORNIA, and THOMAS H. KUCHEL, as Controller of the State of California,

Defendants in Interpleader.

Brief of Appellee Harold M. Davidson, Individually and as Co-Executor of Estate of Olof Zetterlund, Deceased.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Textbooks

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I.

Preliminary Statement.

Olof Zetterlund died on August 21, 1945; at the time of his death he was a resident of the County of Los Angeles, State of California, and for a long time prior

to his death was a resident of and domiciled in Los Angeles County. On August 31, 1945, a petition was filed by Dora Miller and Harold M. Davidson as Executors named in the Codicil to the Will of Olof Zetterlund, as such executors to probate the Codicil and the Will of Olof Zetterlund, deceased, and on September 28, 1945, pursuant to the petition so filed, the Superior Court of the State of California, in and for the County of Los Angeles, admitted the Codicil and the Will of Olof Zetterlund deceased to probate and appointed Dora Miller and Harold M. Davidson as co-executors of said estate and letters testamentary were issued to said parties.

On August 30, 1945, the original last will of Olof Zetterlund without the codicil, was filed in the County Judges Court of Dade County, Florida. On September 25, 1945, plaintiff and others filed their petition in said Court for their appointment as executors of the original will of Olof Zetterlund deceased. Then on October 2, 1945, Dora Miller and Harold M. Davidson under orders of the Superior Court of the State of California, in and for the County of Los Angeles, as co-executors under the last will and codicil of Olof Zetterlund, deceased, filed their petition for revocation of the probate in the State of Florida and filed forthwith an exemplified copy of the codicil to the last will and testament and of the probate proceedings in California. They claimed that the domicile of Olof Zetterlund was in California and that the California Courts had so declared and that the estate was all personal property in Florida, and there was no real

estate involved in the State of Florida, and that it was not necessary to probate the will in Florida, however, as it was so probated the codicil should be admitted. The Court in Florida failed to take any action whatsoever on the codicil offered. The Court in Florida further declared that the competency or incompetency of the deceased was not an issue in the case and it disregarded the Court of California and failed to give full faith and credit to its decision, and proceeded to declare the residence of the deceased to be in Florida.

Florida has adjudicated the residence and domicile of Olof Zetterlund was in Florida but failed to admit the codicil or to take any action thereon. California on the other hand has adjudicated that Olof Zetterlund was a resident of and domiciled in the State of California, and this judgment has become final, and the California Court did admit the codicil to probate.

With this situation, Samuel Nelson, individually, etc., as named in the complaint, filed an action against Dora Miller and Harold M. Davidson, individually and as pretending co-executors, etc., of the estate of Olof Zetterlund, knowing full well that the Courts in California had appointed them as co-executors and that they were not pretending executors or co-executors *de son tort*, and in said cause sued to establish the judgment of the State of Florida as a judgment of the District Court of the United States. On the other hand, Dora Miller and Harold M. Davidson filed a certified copy in their capacity

as co-executors of the estate of Olof Zetterlund, seeking declaratory relief and bringing in by interpleader, the State of California, which had made demand upon the Executors for inheritance tax, and in which it had claimed that the property in the State of Florida should be taxed in California as it was personal property and was within the jurisdiction of the State of California.

The matter was duly set for trial, and at the time of trial it was stipulated between counsel for the respective parties, in open Court, that the real issue to be determined by the Court and upon which the Court would have to pass before proceeding any further in the matter, would be IS THE JUDGMENT OF THE FLORIDA COURT OR THE JUDGMENT OF THE CALIFORNIA COURT ENTITLED TO RECOGNITION BY THE DISTRICT COURT OF THE UNITED STATES. It was upon this issue that the matter was submitted on briefs. From the judgment on this issue this appeal was taken.

II.

Issue.

Is the judgment of the Florida Court declaring the residence of Olof Zetterlund to be in Florida, entitled to recognition by this Court or is the judgment of the State of California, admitting the will and codicil to probate and declaring the residence of Olof Zetterlund to be in California entitled to recognition by this Court, or shall the Court refuse to decide this issue between the two Courts.

III.
Argument.

Appellants have argued that the judgment in Florida is *res adjudicata* as to issues presented, and is therefore entitled to full faith and credit in the United States District Court in and for the Southern District of California, and based their argument on the case of *Sherrer v. Sherrer,* 344 U. S. 343.

The confusion arises in citing this type of case, with the distinction made by our courts between civil actions and probate proceedings. The matter of a probate proceeding is a limited proceeding. Here we have a conflict of laws of two States. When the issue was tried in Florida before the Florida Court, Dora Miller and Harold M. Davidson were appearing there as California executors named in the codicil and were acting under the orders of the State of California as co-executors, they were officers of the California Court and the Florida Court surely could not bind by its decision, officers of the California Court. Florida failed and refused to recognize the judgment of the California Court declaring the residence and domicile of the deceased to be in California.

Quoting from 11 American Jurisprudence, page 484, Section 178:

> "The general principle is well settled that the full faith and credit clause of the Federal Court does not preclude an inquiry into the jurisdiction of the Court rendering the judgment or decree." (This is in reference to the effect of a Foreign probate.)
>
> "In pursuance of this principle it is quite generally held that a decree of one state admitting a will to

probate is not conclusive as to the domicile of the decedent, and this is regarded as a jurisdictional question."

Under the general theory in the majority of Courts, it is maintained that the effect of a decree proving a will, like that of a decree granting administration, is confined *de jure* to the territory, and things within the territory of the State setting up the Courts. The full faith and credit clause of the Federal Constitution does not, according to this view, effect the operation of the probate of a will, as a judicial act of a State beyond its own territories. Full faith and credit is given to such a decree when it is left where it is found local in nature and operation.

Quoting from Restatement of the Law, under CONFLICT OF LAWS, page 563, Section 467:

"An administrator is appointed to administer the estate of a decedent by a competent Court of the State:

(a) Where the decedent was domiciled at the time of his death.

(b) Where there are assets of the decedent at the time of the death of the decedent, or at the time of the appointment of the administrator."

Under Section 469, page 569:

"The will of a deceased person can be admitted to probate in a competent court of any State, in which an administrator could have been appointed, had the decedent died intestate."

Quoting further from said CONFLICT OF LAWS, Section 470, page 570, Subdivision 2:

> "A judgment in administration proceedings by a competent court in the State of domicile, will not of itself invalidate a prior inconsistent judgment by a Court in another State in Administration of the estate of the same decedent in that State."

Subdivision 3:

> "A judgment in administration proceedings in any State, is conclusive upon all persons who became subject to the jurisdiction of the Court in such proceedings."

Subdivision 4:

> "If an issue as to State in which a decedent was domiciled at the time of his death is raised, by a person not precluded from raising the issue under Subdivision 3, a Court will not regard itself as concluding by a prior finding made in another State as to the place of the decedent's domicile."

* * * * * * * *

> "Neither the Fourteenth Amendment nor the full faith and credit clause of the Federal Constitution requires uniformity in the decisions of the Courts of different states on questions of domicile, where the exertion of State power is dependent upon domicile within its boundaries."

Worcester County Trust Co. v. Riley, 302 U. S. 292, 82 L. Ed. 268, 58 S. Ct. 185.

In pursuance of this principle, it is quite generally held that a decree of one State admitting a will to probate

is not conclusive as to the domicile of the decedent, for this is regarded as a jurisdictional question.

2 Am. Jur., p. 485, Sec. 178;

Burbank v. Ernst, 232 U. S. 162;

Tilt v. Kelsey, 207 U. S. 43.

The general principle is well settled that the full faith and credit clause of the Federal Constitution does not preclude an inquiry into the jurisdiction of the Court rendering the judgment or decree. In pursuance of this principle, it is quite generally held that a decree of one State admitting a will to probate is not conclusive as to the domicil of the decedent, for this is regarded as a jurisdictional question. (*Tilt v. Kelsey* (1907), 207, U. S. 43, 52 L. Ed. 95, 28 S. Ct. Rep. 1; *Burbank v. Ernst* (1914), 232 U. S. 162; 58 L. Ed. 551, 34 S. Ct., Rep. 299; *Holyoke v. Holyoke* (1913), 110 Me. 469, 87 Atl. 40; *Scripps v. Wayne Probate Judge* (1902), 131 Mich. 265, 100 Am. Ct. Rep. 614, 90 N. W. 1061; *Re Horton* (1916), 217 N. Y. 363, 111 N. E. 1066, Ann. Cas. 1918a, 611; *Smith v. Smith* (1918), 122 Va. 341, 94 S. E. 777.) A decree of a Texas Court admitting a will to probate is not denied full faith and credit by a judgment of a Louisiana Court annulling the will on the grounds that the testator died domiciled in Louisiana, and that by the laws of that state the will was void, although it may be that the conduct of the testator in Louisiana as evidenced by a notarial declaration of a Louisiana domicile, and by his official act as executor resident in that state, was given greater effect by reason of the Louisiana statute, to counterbalance the testator's declaration that Texas was his permanent home, than

others might give him. (*Burbank v. Ernst* (1914), 232 U. S. 162, 58 L. Ed. 551, 34 S. Ct. Rep. 299.)

It has been consistently held that neither the decree of *res adjudicata* nor estoppel by judgment renders a foreign decree of probate conclusive as respects property situated in the state other than the one in which the decree was rendered.

> *Re Barries Estate,* 240 Iowa 431, 35 N. W. 2d 658, 9 A. L. R. 2d 1939; Cert. den., 338 U. S. 881; Reh. den., 338 U. S. 881; 94 L. Ed. 541, 70 S. Ct. 154.

Conclusion.

The appellees in this case would like very much to have the Court determine the question of residence and domicile, as a matter of fact because they feel that the Court would have a full opportunity to learn all of the facts and that it would decide as California did. However, by careful study of the cases, appellees believe that the lower court rendered a correct decision; that the District Court of the United States should not interfere with the conflicting courts of California and Florida.

Respectfully submitted.

WILLIAM J. CLARK,

Attorney for Appellee Harold M. Davidson.

APPENDIX.

Part A.

Issue.

The appellants have stated the issue as being whether or not the judgment of the Florida Court is entitled to full faith and credit in the U. S. District Court, and is the said judgment *res adjudicata* as to the issues presented by the appellees therein. As we see it the issue is whether or not the U. S. District Court will interfere with the conflicting decisions of the Courts of California and the Courts of Florida.

In the facts the appellants have failed to include the factual pleadings of the answer and cross-complaint filed by the appellees in the lower Court. By stipulation however, the record has now been completed and now shows that the California Court found that Olof Zetterlund was a resident of Los Angeles County. The Florida Courts never gave any consideration to the Codicil in either admitting or denying the same; That the situs of the personal property was never in Florida; that the Florida Court never gave full faith and credit to the California judgment which was rendered prior to the Florida judgment and of which the Florida Court had full notice.

That the question of competency was never the issue; that Harold M. Davidson and Dora Miller appeared in Florida in the capacity of co-executors named in the Codicil to the will of Olof Zetterlund, deceased. That the Florida Court made no finding whatsoever on the Codicil or on the appointment of Harold M. Davidson and Dora Miller as co-executors.